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In The

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 149

ALLIED REALTY OF ST. PAUL, INC.,
Plaintiff,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.,
Respondents,

SIDNEY P. ABRAMSON,
Petitioner.

BRIEF OF EXCHANGE NATIONAL BANK OF CHICAGO IN OPPOSITION TO PETITION OF SIDNEY P. ABRAMSON FOR CERTIORARI

EDGAR BERNHARD
33 North LaSalle Street
Chicago, Illinois 60602
LEONARD W. SIMONET
1200 First National Bank Building
Minneapolis, Minnesota 55402
HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402
MERRILL A. FREED
33 North LaSalle Street
Chicago, Illinois 60602
Counsel for Respondent,
Exchange National Bank of Chicago

Of Counsel:
D'ANCONA, PFLAUM, WYATT & RISKIND
33 North LaSalle Street
Chicago, Illinois 60602
BEST, FLANAGAN, LEWIS, SIMONET AND BELLOWS
1200 First National Bank Building
Minneapolis, Minnesota 55402

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In The

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October Term, 1968

No. 1431

ALLIED REALTY OF ST. PAUL, INC.,

Plaintiff,

vs.

EXCHANGE NATIONAL BANK OF CHICAGO, ET AL.,

Respondents,

SIDNEY P. ABRAMSON,

Petitioner.

BRIEF OF EXCHANGE NATIONAL BANK OF CHICAGO IN OPPOSITION TO PETITION OF SIDNEY P. ABRAMSON FOR CERTIORARI

Respondent, Exchange National Bank of Chicago, files this brief in opposition to the petition for certiorari heretofore filed by Sidney P. Abramson, petitioner herein.

QUESTION PRESENTED

Whether petitioner, a lawyer having been in the public employ as Assistant and Special Assistant United States Attorney, was properly disqualified after his retirement from accepting employment as an attorney in connection with matters which he investigated and passed upon while in such public employ.

STATEMENT OF THE CASE

Petitioner has made a statement of the case which is acceptable to respondent for purposes of this brief, except for four corrections:

First, petitioner correctly states that respondent was not a defendant in the criminal prosecution. What petitioner fails to state, however, is that three former employees of respondent were among the defendants in the criminal case in which petitioner actively participated as government attorney. (Charges against these former employees were subsequently dismissed.) Moreover, several of the defendants in the case at bar, other than respondent, were tried and acquitted in the same criminal case.

Second, petitioner in this case did not represent the State Court Receiver. Petitioner represented Allied Realty of St. Paul, Inc. The State Court Receiver is not a party in this proceeding.

Third, the motion of Allied Realty of St. Paul, Inc., to find the petitioner not guilty of unethical conduct was filed on February 28, 1968, rather than on May 11 as petitioner erroneously states on page 4 of his petition. On March 10, 1968, respondent filed its motion to disqualify petitioner and for other relief. Petitioner was disqualified by order of the United States District Court for the District of Minnesota on April 11, 1968. (238 F. Supp. 464)

Fourth, petitioner correctly states at page 3 of his petition that he participated in the criminal trial from March to June, 1967, and that on November 21, 1967, the Receiver (Mr. Homer A. Bonhiver) petitioned for the appointment of petitioner as attorney. In addition, it should be pointed out that "perhaps towards the end of the trial" though "it might have been even after the termination of the trial" Bonhiver told petitioner "It would be awfully nice of we could use you because of your background in this thing" (R. 58-59); and

that in August of 1967 petitioner had already "begun to act for Mr. Bonhiver" (R. 59). Very little time, if any, elapsed between the criminal trial and the Receiver's approaches to petitioner for his services because of his "background in this thing."

ARGUMENT

The sole contention made by petitioner in support of his petition for certiorari is that the courts below were incorrect in holding that petitioner's conduct was in violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association.

Not only is such a contention insufficient to justify certiorari, but the contention itself is belied by the record. The courts below were clearly correct in holding that petitioner's conduct was in violation of Canon 36.

Canon 36 provides:

> "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

Petitioner is candid enough to admit, at page 2 of his petition, that "some facts and evidence are common to the criminal prosecution" in which he participated actively as government counsel and the instant civil action in which he has been disqualified under Canon 36. Moreover, as the District Judge pointed out in his opinion below, petitioner had access to F.B.I. and postal inspectors' reports, the grand jury minutes and all grand jury and government exhibits. (Petition for cert., p. B-5.)

The very reason for the attempted employment of petitioner subsequent to his government service was the advantage that would result to his new client by virtue of peti-

tioner's extensive knowledge and background in respect to matters particularly relative to respondent as a result of petitioner's participation as government attorney in the criminal trial. (Petition for cert., p. B-6.)

It is apparent, therefore, that petitioner's activities after leaving public employ were precisely and exactly the types of involvement which Canon 36 was designed to prevent.

Petitioner cites no authorities to support his sweeping claim (at page 6 of his petition) that the ruling below represents a departure "from previous decisions relating to the former government attorney." To the contrary, the case of *Hilo Metals Co. v. Learner Co.*, 258 F. Supp. 23 (D. Haw. 1966), one of only two cases cited by petitioner, was relied on by the courts below to support the holding that petitioner was in violation of Canon 36.

In the only other case cited by petitioner, *United States v. Standard Oil Company,* 136 F. Supp. 345, 364, 365 (S.D. N.Y. 1955), the ruling against disqualification was based on the fact that the former government attorney "did not actually come into contact with materials substantially related to the controversy at hand," and that the attorney's work "was unrelated to the instant controversy." In the case at bar, petitioner came into contact with materials directly related to the controversy at hand, and petitioner's work was admittedly related to the instant controversy. Petitioner's disqualification under Canon 36 was therefore inescapable.

Petitioner's witness Hyam Segell did not testify, as suggested by petitioner at page 8 of his petition, that there was no violation by petitioner of Canon 36. The witness gave most guarded answers when asked what his opinion was as to whether a lengthy hypothetical case constituted a violation of Canon 36. He answered that he would first have to try to refresh his recollection as to Canons 36 and 37; that

he believed that Canon 36 "is the conflict of interest Canon" (which, of course, it is not) and that he did not recall Canon 37 "unless I have those reversed." He was then handed Canon 36, and at his request he then also examined Canon 37; and then (after a long and uncomfortable pause, which of course is not reflected in the record) he was able to give the following vague answer for what it may be worth: "My opinion is that it is not a violation of the two Canons when read in combination." (See petition for cert., p. E-12.)

Finally, as to the article by Judge Kaufman, "The Former Government Attorney and the Canons of Professional Ethics," 70 Harv. L. Rev. 657, 666 (1957), Judge Kaufman makes it clear that his concern is how far knowledge should be imputed to lawyers in a large government agency "in the absence of proof of actual knowledge." In the instant case, there is abundant proof of petitioner's actual knowledge of, and direct participation in, the very matters in which he subsequently gained private employment.

CONCLUSION

For all the foregoing reasons, respondent asks that the petition for certiorari of Sidney P. Abramson be denied.

Respectfully submitted,

EDGAR BERNHARD
33 North LaSalle Street
Chicago, Illinois 60602

LEONARD W. SIMONET
1200 First National Bank Building
Minneapolis, Minnesota 55402

HAROLD C. EVARTS
1200 First National Bank Building
Minneapolis, Minnesota 55402

MERRILL A. FREED
33 North LaSalle Street
Chicago, Illinois 60602

Counsel for Respondent,
Exchange National Bank of Chicago

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D'ANCONA, PFLAUM, WYATT & RISKIND
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